UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

GF East Paterson Foods LLC. Employer, and United Food & Commercial Workers Union Local 464A Union, and Ellioti Tapia, Petitioner.	Case 22-RD-210352

UNION'S OPPOSITION TO REQUEST FOR REVIEW

United Food & Commercial Workers Local 464A respectfully opposes the Request for Review of the Region's postponement of the representation hearing.

1. The Request for Review argues, first, that meritorious unfair labor practice charges should never affect a decertification petition. This is a facial attack on the "blocking charge" rule codified at Rules & Regs. § 103.20. This attack must be brought as a petition for rulemaking.

2. The Region has found probable cause that the Employer has, in violation of a prior Formal Settlement:

- refused to bargain through an agent empowered to bind the Employer
- threatened employees with store closure if the Union wins a contract
- circulated a withdrawal petition
- made unit-wide unilateral changes in work hours.

The charges were filed months before the petition. The Region is now prosecuting serious "Type II" violations that preclude a Question Concerning Representation, Casehandling Manual, ¶11730.3. By denying that this conduct can preclude a QCR, Petitioner is asking the Board to overrule *Franks Bros. v. NLRB*, 321 U.S. 702 (1944) and *Brooks v. NLRB*, 348 U.S. 96 (1954).

3. Petitioner's proposal to conduct a tainted election, but hold its outcome in abeyance, does nothing to advance free choice. This is not a matter of eligibility challenges affecting less than 20% of the unit, but a unit-wide campaign to induce disaffection with the Union. Because the employees remain represented by the Union pending post-election objections, a "contingent" election prior to a remedy for the ULPs would not advance the time at which a decertification could take effect.

4. Petitioner's demand that the Union privately litigate its ULP charges in a pre-election hearing violates Section 3(d). As long as Congress gives the General Counsel exclusive authority to prosecute refusals to bargain and threats of store closure, any pre-election hearing to determine the merit of these charges must be the General Counsel's ULP prosecution mandated by § 3(d).

5. Pre-election litigation to determine how each employee's view has been affected would destroy the secrecy of the ballot in the R case. Such a hearing would force parties to subpoena every unit member to testify about the reasons for their support or disaffection. If the Board allowed this, the Board would logically have to allow parties to litigate all other motives for employee signatures on the showing of interest, including fraud, rescission, and supervisory taint R hearing.

STATEMENT OF FACTS

A. Original Bargaining Settlement

The Employer bought a former A & P store that had been represented by UFCW Local 464A. It hired a majority of the store's former employees. In Case 22-CA-168193, the General Counsel issued complaint that the Employer was a . *Burns* successor who unlawfully refused to bargain. The Employer settled the Complaint on the eve of trial on Sept. 16, 2016, with a promise to recognize and bargain in good faith.

Petitioner admits that bargaining began on or about December 17, 2016.

B. Formal Settlement with Broad Language

Almost immediately, the Employer began to undermine the NLRB's process. It defaced the Board posting with a second notice effectively disclaiming its bargaining obligations. On October 21, 2016, the Union filed a charge against this conduct in Case 22-CA-186945. The Region required the Employer to enter a Formal Settlement Stipulation Agreement on February 23, 2017.

This Formal Settlement included broad language requiring it to cease and desist from "in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act." Formal Settlement, p. 4. This language "in any other manner" is the broadest possible language in a cease-and-desist provision, which is breached by any subsequent violation of the Act. *U.S. Postal Service*, 345 NLRB 426, 426 (2005).

C. The Current ULPs

The Employer nevertheless continued to violate the Act.

The Union's charges were filed well before the petition. In Cases 22-CA-196390 (filed April 6, 2017), 22-CA-199467 (filed May 25, 2017), and 22-CA-208888 (filed October 30, 2017), the Region made merit determinations on November 30, 2017, communicated by email as follows:

- Refusal to Bargain- The Region found that the Employer's representative in bargaining lacked authority to bind the Employer, which the Region found frustrates meaningful bargaining
- Unilateral Decrease in Working Hours- The Region found that the Employer unilaterally decreased working hours without notifying and bargaining with the Union.
- Employer Involvement in Withdrawal Letters- The Region found that the Employer prepared and circulated letters for employees withdrawing authorization cards and demanding decertification.
- Threats of Plant Closure- The Region determined that the Employer threatened employees with plant closure if the Union secures a contract in violation of Section 8(a)(3) of the Act.
- Refusal to Provide Information- The Region found that the Employer violated Section 8(a)(5) by failing and refusing to respond to the Union's request for unwritten work rules, work quotas, policies, practices, or procedures.

D. The RD Petition

The petition in this case was filed on November 22, 2017. This is less than a year after the Employer purported to begin bargaining, and only eight days before the Region's complaint determination on the Union's charges filed months before.

E. The Postponement Order

On November 30, 2017, the Regional Director postponed the RD hearing "in order to allow time to investigate and determine the impact, if any, on the petition herein, of the unfair labor practice charges filed in Cases 22-CA-196390, 22-CA-199467 and 22-CA-208888." The Region has not dismissed the petition.

ARGUMENT

I. Petitioner Must Challenge the "Blocking Charge" Procedure of Rules & Regs. § 103.20 Through Rulemaking.

The Regional Director's postponement of the R hearing was authorized by Rules & Regs. § 103.20. Section 103.20 authorizes Regional Directors to hold petitions in abeyance if they find merit in unfair labor practices that "would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself."

To the extent that Petitioner is complaining about the very existence of a blocking charge policy, Petitioner is complaining about Rules & Regs. § 103.20. Petitioner must raise this challenge through a petition for rulemaking. It may not ask the Board to nullify its published regulation casually through *ad hoc* decisionmaking.

The Board is authorized to promulgate a blocking-charge policy by Section 6 of the Act, 29 U.S.C.A. § 156. Once it does so, Rules & Regs. § 103.20 is binding on the Board until and unless it rescinds the regulation through notice and comment under the Administrative Procedure Act. The Board is bound by its own rules until it changes them, "including the rules that it has adopted in order to channel what would otherwise be an essentially unreviewable discretion in the deployment of its limited prosecutorial resources." *Human Development Ass'n v. NLRB*, 937 F.2d 657, 661 (D.C. Cir. 1991), *citing NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661, 663-64 (7th Cir.1990); *see also Aramark Corp. v. NLRB*, 179 F.3d 872, 882 (10th Cir. 1999) (*en banc*); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-764 (1969).

II. Petitioner Is Attacking the Law That Serious ULPs Preclude a Question Concerning Representation under *Franks Bros. v. NLRB*, 321 U.S. 702 (1944) and *Brooks v. NLRB*, 348 U.S. 96 (1954).

The Board may not, consistent with § 3(d) of the Act, make findings about whether an alleged ULP has been committed prior to the General Counsel's litigation in a C case. However, it may review the Regional Director's determination whether a given ULP allegation, if true, is serious enough to block.

The ULPs alleged here by the General Counsel are extremely serious. This is not a technical violation (like an unenforced handbook rule) or garden-variety §8(a)(1) conduct directed to a few employees. Here, the ULPs are unit-wide. They are designed to create disaffection by rendering the Union powerless to win a contract, and by threatening wholesale loss of jobs from store closure if the Union did win a contract. Under these circumstances, it is not surprising that some

employees may wish to be rid of the Union. As long as the ULPs are unremedied, the Union's very existence appears to threaten their jobs, while the Union lacks the ability to negotiate for an agreement binding on the Employer. Employee free choice in this context is merely the freedom to surrender to the Employer's unlawful threats and stonewalling.

By denying that this conduct precludes a QCR, Petitioner is asking the Board to overrule *Franks Bros. v. NLRB*, 321 U.S. 702, 705 (1944) and *Brooks v. NLRB*, 348 U.S. 96, 100 (1954). In these cases, the Supreme Court agreed that an employer's refusal to bargain and threats should not be rewarded by a decertification based on employees' understandable conclusion that the Union can do nothing for them. In *Franks Bros.*, the Court held that where a union lost its majority after an employer's refusal to bargain, the Board appropriately refused to give effect to employee rejection of the union: "The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation . . . thus providing employers a chance to profit from a stubborn refusal to abide by the law." 321 U.S. at 705.

In *Brooks*, the Court stressed that employer refusals to bargain may not be rewarded by the decertification effort it intends to stimulate prior to a remedy: "It is scarcely conducive to bargaining in good faith for an employer to know that, if he

dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time . . .” *Brooks*, 348 U.S. at 100.

This is particularly true for employer involvement in the decertification effort. In this case, the Region is prosecuting the Employer for preparing and circulating letters demanding withdrawal and decertification. As long as that violation goes unremedied, any parallel petition by employees carries the taint of the Employer’s unlawful effort. *See Hearst Corp.*, 281 NLRB 764, 764 (1986) (where employer seeks to solicit employee repudiation of union as representative, decertification petition is tainted and employer “will be precluded from relying on [it] as a basis for questioning the union's continued majority support”), *enfd. mem.* 837 F.3d 1088 (5th Cir. 1988); *Ron Tirapelli Ford*, 304 NLRB 576, 579-580 (1991), *enfd. in rel. part* 987 F.2d 433 (7th Cir. 1993).

This is not an issue that depends on witness demeanor or nuances in the facts. An employer's refusal to bargain is presumed to cause any employee disaffection that arises during the unlawful conduct. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 178 (1996), *affd. in relevant part* 117 F.3d 1454 (D.C. Cir. 1997). The remedy in this case, whether through settlement or Board Order, will necessarily include an affirmative bargaining order which bars petitions for at least six months. *Lee Lumber*, 322 NLRB at 178. Similarly, an extension of the bar period is a basic necessity in any case where the employer has undermined bargaining, *see Mar-Jac Poultry*, 136 NLRB 785, 785-786 (1962). Otherwise,

employers would simply refuse to bargain during a certification year and force the Union to "prove" that this caused disaffection in the resulting decertification proceeding. That is not how the Board treats refusals to bargain. A bad-faith bargaining violation, if found, is itself the type of violation which *per se* precludes a question concerning representation. *See Big Three Industries*, 201 NLRB 197, 197-198 (1973); *Brannan Sand & Gravel*, 308 NLRB 922, 922 (1992).

Petitioner's position would require the Board to abandon 80 years of this agency law, to hold (contrary to *Franks Bros.*, *Brooks*, *Lee Lumber* and *Mar-Jac Poultry*) that decertification elections may proceed even as the Employer refuses to honor its Formal Settlements and engage with the Union in meaningful bargaining.

III. Moot Elections Prior to ULP Resolution Do Nothing for Free Choice.

Petitioner points to the fact that the General Counsel's complaint allegations have not yet been finally adjudicated. If this makes a difference, no ULPs, no matter how egregious, can preclude a decertification election. Because employers may delay the final adjudication of a ULP by exhausting appeals for one to three years to the Circuit Courts, *see NLRB Annual Report* (2009), Table 7, any ULP (even outright repudiation of the Union) occurring within a year before decertification will always be "unadjudicated," and therefore legally meaningless in the Petitioner's view.

Petitioner suggests that the Region be required to conduct a decertification election even while the Region litigates a Complaint that the election is tainted.

Petitioner proposes that the outcome of the election be held in abeyance, pending the later resolution of the ULPs.

Petitioner compares this to the Board's practice to allow elections to proceed if eligibility challenges affect less than 20% of the unit. Rules & Regs. § 102.65-.66. But a deferred eligibility issue affecting less than one-fifth of the unit is not the same as a refusal to bargain that affects the entire unit. Deferring eligibility disputes of a small fraction of the unit allows for free choice by both challenged and unchallenged voters. The basic legitimacy of the election is not at stake in a post-election challenge procedure.

By contrast. a unit-wide refusal to bargain calls the validity of the entire election into question. Conducting a moot RD election that the Region simultaneously contends to be tainted would do nothing to further employee free choice. Because employees remain represented by the Union pending objections to a decertification election, *see W.A. Krueger Co.*, 299 NLRB 914, 916-917 (1990);, a "contingent" RD election while the ULPs remain unremedied would not advance the time at which a decertification could take effect. If the ULP complaints were ultimately dismissed, employees would be free to proceed with a petition immediately for a contemporaneous election, rather than relying on provisional votes cast months or years before.

IV. Private Litigation of ULPs in an R Hearing Violates Section 3(d).

In the alternative, Petitioner demands that the Union privately litigate its ULP charges in a pre-election "*Saint Gobain*" hearing. This misses the point. A hearing to assess the effects of a ULP under *Saint Gobain Abrasives*, 342 NLRB 434 (2004), presumes that General Counsel's prosecution of the ULP has ended. By contrast, Petitioner is demanding here that the Union litigate its ULPs privately in a pre-election R hearing, independent of the General Counsel.

This violates Section 3(d). To be sure, unions like Local 464A would relish the right to litigate ULP charges independently of the General Counsel. If Local 464A had such a private right, it would have already proceeded to prove its charges filed in April and May 2017, and would already have won a § 10(j) injunction.

But the Act reserves this right to the General Counsel. *NLRB v. Food Workers Local 23*, 484 U.S. 112, 126 (1987). As long as Congress gives the General Counsel exclusive authority to prosecute ULPs like refusals to bargain and threats of store closure, any pre-election hearing to adjudicate the merit of these charges must be the General Counsel's ULP prosecution mandated by § 3(d).

This is exactly why the Board does not permit private parties to litigate ULP claims in an R hearing. Such claims can only be litigated by the General Counsel. In this case, Local 464A would gladly litigate whether the showing of interest in the RD petition was illegally influenced by supervisors. The Union, however, is not allowed to litigate this through subpoenas in the R case, precisely because this is a ULP allegation that must be made by the General Counsel. *See Union Mfg. Co.*, 123

NLRB 1633, 1633 (1959).

If the Board were to require unions to litigate their ULP charges independent of the General Counsel in pre-election R hearings, it could not continue to bar parties to an R case from litigating any other claim that the showing of interest was motivated by some unfair labor practice by the employer or the union.

The rule against such litigation is rooted in the General Counsel's exclusive authority under § 3(d). The Board would violate § 3(d) by requiring "*Saint Gobain*" hearings pre-election, even before the General Counsel had litigated the ULP.

V. Pre-Election Litigation Over Voter Attitudes Would Destroy the Secrecy of the Ballot.

Petitioner also demands that the Union prove the effect of the alleged ULPs on voters in a pre-election R hearing.

In addition to infringing on the General Counsel's exclusive authority, this proposal would destroy the secrecy of Board elections in the R case. Such a hearing would force parties to subpoena every employee in the unit to testify about their union support or disaffection and the reasons for their changing attitudes. Every member of the unit would potentially have to testify in a public, Board-mandated poll, to be cross-examined under oath by their employer, the Petitioner, and the Union about whether they support or have ever supported the Union, and why their support or disaffection has changed over time.

This would make a mockery of the Board's election process. To prevent such litigation, the Board enforces firm presumptions that refusals to bargain cause

employee disaffection, without permitting parties to rebut that presumption by cross-examining unit members. *Hearst Corp.*, 281 NLRB 764, 765 (1986) (decertification petition tainted by employer refusal to bargain, notwithstanding employer's offer to call a majority of workers in the unit to testify that they were not influenced by the violations.) Bad-faith bargaining is a *per se* violation that precludes a question concerning representation. *See Big Three Industries*, 201 NLRB 197, 197-198 (1973); *Brannan Sand & Gravel*, 308 NLRB 922, 922 (1992).

If the Board allowed this kind of litigation over the motivations of petition signers, parties in a R case could with equal right demand to litigate claims that fraud, rescission, and supervisory taint motivated the showing of interest. This would destroy the R procedure in effect since the beginning of the Act.

CONCLUSION

The Board should deny the Request for Review.

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Respectfully submitted,

/s Michael T. Anderson

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Certificate of Service

I hereby certify that on December 21, 2017, a copy of the Union's Opposition to Request for Review was served by email on the following:

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